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November 18, 2014

James T. McClymonds
Chief Administration Law Judge
NYSDEC Office of Hearings and Mediation Services
625 Broadway, 1st Floor
Albany, NY 12233-1550

Judge McClymonds:

Thank you for providing this opportunity to submit comments concerning Chemical Waste Management's (CWM) proposed RMU-2 expansion to its existing landfill in Niagara County. Buffalo Niagara Riverkeeper (Riverkeeper) is one of Western New York's leading non-profit organizations regarding the protection and stewardship of the region's fresh water resources. As such, our interest in this permit application and the larger subject of waste management practices is to ensure that the policy, process, science and community-based analyses used to evaluate the request are given careful and thoughtful attention in order to ensure that no adverse impact will occur to the community or environment now or in the future, as a result of the proposed activity. The existing facility and proposed expansion locations are located in the Niagara River watershed, approximately two miles from the Niagara River and three miles from Lake Ontario. The Niagara River is currently being addressed by the New York State Department of Environmental Conservation, the International Joint Commission, and US Environmental Protection Agency based on its designation as an "Area of Concern" which is due, in part, to contaminated bottom sediments. Lake Ontario provides drinking water to approximately 8 million people throughout the United States and Canada.

The following comments mainly address the findings of three basic permit documents that will inform the Siting Board's decision on CWM's proposal for RMU-2. These documents include: the *New York State Hazardous Waste Facility Siting Plan* (Plan, 2010), the CWM Draft Environmental Impact Statement (DEIS), and the Facility Siting Criteria and CWM scoring anticipated for RMU-2. Based on our review of these documents and our knowledge of the project area, **Riverkeeper concludes that the proposed RMU-2 facility is not consistent with the State Hazardous Waste Facility Siting Plan and therefore a permit should not be issued for its construction.** We provide the following:

1. NYS Hazardous Waste Facility Siting Plan

The NYS Hazardous Waste Facility Siting Plan (Plan) states two basic criteria for deciding whether of not to site a new hazardous waste facility in New York State:

Criteria 1 - Is a proposed facility consistent with the Plan? See Sections 2 and 3 below for an itemization of inconsistencies with the Plan's criteria.

Criteria 2 - Is a proposed facility otherwise necessary or in the public interest? The Plan itself provides a clear "No" to this question in regard to proposed RMU-2, as follows:

- Clear need not demonstrated. The Siting Plan begins and ends with a clear statement that current "capacity exists for the foreseeable future", and since its publication, capacity was added in Wayne County MI—adding 44 years to NE PCB landfill capacity at current disposal rates as of 2014. In addition, the following statement appears within the plan: **"Based on the national availability of facilities, there are sufficient available TSD facilities for management of RCRA hazardous waste generated in New York, and will be for the foreseeable future."** Periodically USEPA revisits the issue of national capacity and need through analysis of available data and regulators at both a state and federal level and will have years of lead time to address potential capacity shortfalls. Thus there appears to be no current or near term need for increased capacity for hazardous waste management in New York State. For PCB wastes that can be landfilled, landfill capacity is estimated to exist through 2021, with landfill capacity for Mega Rule PCB remediation waste estimated to exist beyond 2100 for the northeast quarter of the country." (Plan, 6-9)
- Phase-out goal. Creating more landfill capacity contradicts and undermines the Plan's phase-out goal. The Siting Plan states that its goal is "to phase out land disposal of hazardous wastes, other than treated residuals posing no significant threat to public health or to the environment." It ranks landfilling as the least desirable alternative in the hazardous waste management hierarchy of alternative treatments, due to:
 - "the long-term containment uncertainties associated with land burial,
 - the characteristics of the hazardous waste which degrade containment mechanisms used in authorized hazardous waste land burial facilities, and
 - the persistence, toxicity, mobility and propensity to bio-accumulate of such hazardous wastes and their toxic constituents." (Plan, 4-5)
- Environmental Justice. The Plan states that "the Siting board should evaluate the location of a proposed facility, including past and present activities at the property and in the surrounding area including transportation issues, the facility's compliance history, and environmental justice considerations." It quotes the DEC environmental justice policy including "fostering green and healthy communities...redevelopment of contaminated land, air and water quality,...[and] quality of life and public health." (Plan, 9-6,7)

The burden on residents of existing hazardous waste makes this location least favorable for adding more. Past activities at the CWM/Model City site include landfilling of over 9 million tons of hazardous waste and a long history of permit violations and corrective actions. The RMU-2 facility would add an estimated 4 million cubic yards or 6 million tons to the waste burden. (Draft permit)



Additionally CWM is located adjacent to and over other major hazardous waste sites including the Niagara Falls Storage Site and the 7,500-acre Lake Ontario Ordinance Works (LOOW) where the waste mix includes radioactive waste. As CWM notes in the DEIS scoping document for RMU-2, “previous use by the US government as part of LOOW, or other reasons could explain any contamination of off-site fish or surface ditches. Without more information it is not possible to evaluate any such off-site contamination and related causes or sources.” (p.10) By the same token, adding RMU-2 to this landfill complex will further complicate efforts to characterize and delineate the volume, location and migration of existing contaminants and will further postpone remediation of the LOOW site.

The surrounding area includes rates of Colorectal, Prostate and childhood cancer at 50-100 times expected rates. (NYS DOH Cancer Incidence by zip code, Niagara County). Also, depressed property values are a direct result of the general perception that the groundwater and soils are not safe.

2. Draft Environmental Impact Statement (DEIS)

Potentially impacted ecological communities. The DEIS looks at ecological communities potentially affected by the RMU-2 “project region,” which is defined as the area north of Route 104 to Lake Ontario between the Niagara River and Ransomville Road. This definition is flawed insofar as it excludes the lower Niagara River itself and the western basin of Lake Ontario, both downstream of and potentially affected by CWM discharges of persistent toxic contaminants to groundwater, surface water and sediments via outfalls to the Niagara River, Four Mile Creek and Twelve Mile Creek. Reference is made to issues raised by the Niagara County Municipal Stakeholders' petition on this matter regarding discharge limits for PCBs. We ask DEC to fully evaluate this issue as we consider it to be significant and substantive.

As a connecting channel between Lake Erie and Ontario, the Niagara River is a globally significant corridor for migratory fish and birds, but also a significant source of contaminants like PCBs, causing fish and wildlife consumption advisories in the lower river and across Lake Ontario. Aquatic species potentially impacted by CWM outfalls should not be ignored.

The DEIS states that “there have been no recent observations of rare or state-listed animals and plants, significant communities and other significant habitats located within the proposed project site.” (DEIS 3.5.5.) **Riverkeeper disagrees with this assessment. Here are some of the New York State-listed wildlife species/communities that potentially are impacted by the CWM facility expansion:**

- Lake Sturgeon (NYS threatened): The lower river, including “Peggy’s Eddy” which is in the area of CWM outfall 001, is a known Lake Sturgeon area (US FWS; Lowie, 1999). Populations of Lake Sturgeon are considered to be at about 1% of historic abundance (Carlson, 1995; Hay-Chmielewski and Whelan, 1997; COSEWIC, 2006). As a long-lived, bottom-feeding species, Lake Sturgeon may be especially vulnerable to contaminants like PCBs accumulated in river sediments and benthic biota.
- Indigenous State-listed fish-eating birds and wildlife. The lower river also plays an important role in the life cycle of many of the bird species that make the Niagara River a globally significant Important Bird Area. PCBs and other persistent toxic contaminants in the water and sediments threaten the biotic integrity of aquatic communities, including

benthic organisms, fish, and the animals that eat them. Buffalo Audubon records include many piscivorous, NYS-listed RTE and species of concern in Joseph Davis State Park, which is within the DEIS-defined project region. These species include Pied-billed Grebe, Bald Eagle, Common Tern, Osprey, Common Merganser and a variety of listed gulls. The DEIS itself lists several other NYS-listed species of concern in the project region including Blue-winged Teal, Great Blue Heron, and a Pocketbook mussel species *Lampsilis ventricosa*. (DEIS, Table 3-6)

- State-listed upland birds that likely breed in the project region include Savannah Sparrow, Bobolink, Eastern Bluebird, Eastern Meadowlark, Horned lark, Whip-poor-will, Northern Harrier, Sharp-shinned Hawk, Cooper's Hawk and Common Nighthawk (Audubon).

3. Siting Criteria

A site scoring above 200 points is deemed inconsistent with the State's siting considerations and criteria (NYS ECL 361.7). CWM scores the proposed RMU-2 facility at 152 points based on 14 criteria. Based on Riverkeeper's review of those siting considerations within our area of expertise, the overall score for RMU-2 should substantially exceed 200 points as per the discussion below.

- 1a: Population density in the vicinity of the proposed site. "Vicinity of the proposed site" is defined as "residential and nonresidential population within 0.5 miles of the site boundary." This definition not only contradicts the project region as defined in the DEIS; it also excludes potential project impact areas such as the wastewater pipelines and air emissions that move contaminants off-site. It excludes a major vulnerable population—school-age children in the Towns of Lewiston and Porter. The campus of the largest of these schools, LewPort (2,100 children), is situated over hydraulic connections between the CWM site and the Niagara River. Due to these potential exposures this criterion should reflect a vicinity of 3 miles and receive a Least Favorable ranking of 3.
- 4b: Proximity to incompatible structures. All of the public schools in the Towns of Lewiston and Porter are located along the transportation route or within the potential impact area of air and water discharges off site. This should also be scored a Least Favorable ranking of 3.
- 6. Municipal effects. Can "consistency with the intent of master land use plans" and with local laws be ranked a "2" when all Niagara County local governments, agencies, and school districts are on record opposed to the proposed CWM expansion and when the 2007 Niagara River Greenway Plan has invested tens of millions of dollars into ecological and recreational improvement of the Niagara Greenway? The siting of the proposed facility has major inconsistencies with the specific intent and overall approach of the Greenway Plan and with every municipal waterfront master plan within the Greenway. Given what these local officials have said about declining public revenues and increased public awareness of the negative quality-of-life effects, such as health issues and depressed real estate values, associated with living near a major toxic landfill, all three categories here should be ranked 3, Least Favorable.
- 7. Contamination of ground and surface waters: Annual discharges ranging from between 10 and 30 million gallons of treated wastewater from CWM facultative ponds



add to PCBs in the Niagara River each year. (Abraham, 2005) Over a dozen permit violations associated with these discharges were cited in a DEC 2008 Consent Order with CWM. However, the permit application does not evaluate the condition or useful life of this discharge pipeline which is over 35 years old, potentially subject to leaking and/or infiltration and runs generally west from the facility, under the LewPort School campus to the Niagara River. Increasingly severe and flashy storms will potentially generate more runoff and more groundwater overflow as when the snowmelt from the “Blizzard of ‘77” caused Love Canal to overflow the following spring.

Discharges of CWM wastewater into tributaries of Four Mile and Twelve Mile Creeks have exceeded permitted concentrations of PCBs. As a result, the DEC proposed additional internal outfalls for CWM to identify the source(s) in 2008. However, to date the SPDES permit for these discharges has not been modified. A 2010 NYSDEC Biological Assessment Profile at Four Mile Creek shows in-stream habitat to be severely impacted for aquatic life. The 1.89 BAP score at this site may be the lowest on record for streams in Western New York. Riverkeeper is waiting for a response from DEC as to the location of CWM’s outfalls in relation to this stream segment.

These histories and uncertainties regarding underground migration recall the reasons listed in the Siting Plan for phasing out hazardous waste landfilling in New York State (see 1.2. a-c above). All three items in this category should be scored Least Favorable.

- **10. Air quality.** The proposed expansion includes open air hazardous waste lagoons (66 million gallon capacity) that depend on the air to absorb volatile pollutants (PCBs) with residuals discharged to the Niagara River—called by critics “an uncapped landfill.” Given this exposure of volatiles to air, air quality should be scored a 3 as it was for RMU-1.
- **12. Preservation of RTE species.** “Sites are least acceptable where the development and operation of proposed facilities is likely to jeopardize the continued existence of endangered, threatened or indigenous species by destruction of their habitat.” See DEIS comments above concerning the need to protect NYS-listed indigenous species in the project region. Lake Sturgeon and Bald Eagle are just two of the threatened species with critical habitat in the project region. This should be scored at least a 2.
- **13. Conservation of historic and cultural resources.** The Niagara River itself; Joseph Davis, Four Mile Creek and Fort Niagara State Parks; the Niagara Greenway; the historic Village of Lewiston; and the pre-Iroquoian and Haudenosaunee “customary use” sites along the river are all part of the Niagara region’s cultural heritage. Their importance increases as the region’s economy shifts away from heavy industry and as funding is more available for habitat restoration, place-based recreation and tourism. Conservation of this natural and cultural capital is likely to be adversely affected by expansion of the landfill. This should be scored a 3.
- **14. Open space, recreational and visual impacts.** Development and operation of the RMU-2 facility is likely to adversely affect all the open space, recreational, scenic and tourism resources that are now becoming more robust, visible and treasured in the project region thanks to new interest and funding for the Niagara River Greenway, Niagara Escarpment protection, and NYS Open Space priorities. All three items under #14 should be ranked 3, Least Favorable, given this resurgence of the Niagara region and the advancement of open space, recreation and scenic vistas that is occurring.



Much has changed in the project region since RMU-1 was approved. The Niagara River Remedial Action Plan has invested millions of dollars in cleaning up landfills and waste discharges to the river. The Niagara Greenway Plan has helped promulgate and build a vision of connected open space, resilient habitat, cultural celebration and ecotourism in the region. Both plans have fostered research that is increasing our knowledge of the natural and cultural resources of the region including:

- **Lower Niagara Lake Sturgeon and benthic organisms research:** Researchers from the Great Lakes Center, SUNY Buffalo State and U.S. Fish and Wildlife Service
- **Niagara Greenway Habitat Strategy:** Buffalo Niagara Riverkeeper
- **Joseph Davis State Park Bird Habitat Restoration:** Buffalo Audubon
- **Niagara Escarpment Conservation Plan:** the WNY Land Conservancy
- **Stella Niagara conservation and kayak access plan:** the WNY Land Conservancy

All of these efforts are bringing more people and wildlife to the project region and reducing the prospect of an additional hazardous waste facility to the least acceptable use of the land. Within the Western New York region, the cumulative impacts associated with hazardous waste disposal activities have far exceeded the carrying capacity of our human and natural resource systems. For this and all the reasons stated with this letter, Buffalo Niagara Riverkeeper is opposed to requested permit for expansion.

Thank you again for the opportunity to provide comments on this request. If you have any questions regarding our comments, please do not hesitate to contact me at 716-852-7483 x21 or jedlicka@bnriverkeeper.org.

Sincerely,



Jill Jedlicka,
Executive Director

MW:KW:jsj

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